

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

EDWARD CARDWELL,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

FILE
OCT -4

BRIEF OF APPELLEE:

CARL RASCH,

United States Attorney.

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BRIEF OF APPELLEE.

Counsel for the appellant has wholly failed to comply with subdivision "a" of section 2 of rule 24 of this Court, in that the brief filed by him in this case does not contain an abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised. Counsel makes no statement of the facts of the case, as disclosed by the record on file. They are substantially as follows:

The appellant, who is a "rancher and stock grower," residing in Billings, Yellowstone county, Montana (Tr., p. 143) asserts, and exercises in fact, the right to the exclusive use and occupancy of large tracts of lands, situate in the counties of Yellowstone and Sweetgrass, in the State of Montana (Tr., pp. 164, 166). Both tracts are inclosed and surrounded by fences. (Tr., pp. 164-165.) The lands involved in this case are situated in Yellowstone county, Montana, the lands lying in Sweetgrass county not having been set out or described in the affidavit filed in the United States Attorney's office upon which this action was brought, no decree could be entered as to them. Referring to the diagram of the lands involved, prepared and used upon the hearing by the appellant (Deft's Ex. "A", Cardwell, Tr., p. 181), the two inclosures are divided and separated by the county road, marked upon the plat (Tr., p. 164), the lands within the inclosure in Yellowstone county, which for convenience may be called the eastern inclosure, being the western tier of sections of Township 1 south, of Range 21, east of the Montana meridian, and some twenty sections of Township 1 south, of Range 20, east, and the lands involved in this suit within the inclosure located partially in Yellowstone and partially in Sweetgrass county, the western inclosure, are sections 6, 8 and 18 in said Township 1 south, of Range 20, east. These lands are situate within the primary limits of the Government grant to the Northern Pacific Railroad Company, and the appellant, prior to the con-

struction of the fences constituting the inclosure referred to, had purchased from the railroad company the odd numbered sections embraced within the inclosures, the even numbered sections, likewise inclosed together with the odd sections, being public lands of the United States. (Tr., p. 131.) That portion of the fence constituting the western inclosure which surrounds sections 6, 8 and 18 of Township 1 south, of Range 20, east, was erected and maintained by the appellant, and so likewise the fences of the eastern inclosure, except a portion of the one in the north of the township, were constructed by the appellant, Edward Cardwell. At the time of the construction by the appellant of the eastern inclosure, in 1900 (Tr., p. 151), there was a fence in existence extending from the northeast corner of Section 1, Township 1 south, Range 20, east (Tr., pp. 108, 146), and from that point the fence continued on in a northwesterly direction. (Tr., pp. 148-149.) The zigzag line of fence, marked on the diagram, running through Section 2 and around 10, connecting the northwest corner of section 1 with the northeast corner of section 9, in Township 1 south, of Range 20, east, is said to have been built by one A. L. Thomas in the spring or summer of 1902 (Tr., pp. 146, 158), although the witness Nelson testifies that the north side fence belongs to the appellant, Cardwell, and that appellant's foreman, Bland (Tr., p. 162), assisted in putting up that fence. (Tr., pp. 62-63.) While the appellant concedes that he originally constructed all of the fences on three

sides of the eastern inclosure, the east, south and west sides, and a portion of the north side, along the south side of section 4, he claims that he does not now own or control that portion of the fence extending along the west side of section 28 on the west side of the inclosure, nor those portions of the fence extending along the east lines of sections 6, 18 and 30 in Township 1 south, Range 21, east. As to the mile of fence extending along the western line of section 28, the appellant claims to have exchanged that mile of fence with one Rosean for a mile of fence constructed by Rosean along the west line of section 31 (Tr., p. 156); and as to the three miles of fence on the east side of the inclosure, the same were built by the appellant. "with an agreement with Cab Thomas and Witt when they bought the land." (Tr., p. 146.) The arrangement was that appellant Cardwell should build the fence, and he did build it. He claims, however, that afterwards Thomas paid him for two miles and Witt for one mile of the east side fence. (Tr., pp. 154-155.)

A large number of sections of public Government lands were inclosed by means of these fences, together with the railroad sections purchased prior to the construction of the inclosures. Access to or transit over these lands was impossible, and an absolute right to the exclusive use and occupancy of all the lands embraced within these inclosures was not only asserted and insisted upon by the appellant, but such use and occupancy was at all times peremptorily and vigorously enforced. Geo.

W. Bland was the appellant's foreman, and his duties were to look after stock within the inclosure, riding over the lands inclosed, as much as three times a week, and keeping the fences up and in repair. (Tr., pp. 111-112.) He had orders from the appellant, Cardwell, to turn out all stock found within the inclosure, which did not belong to the appellant (Tr., pp. 128, 129, 133), and Bland obeyed his instructions. (Tr., p. 134.) These orders were given to the foreman and those under him by Cardwell (Tr., p. 161), and no stock of other persons was allowed to remain within the inclosure. (Tr., pp. 57, 58; Haldane's testimony, Tr., p. 70; Wimsett's test., Tr., p. 74; Jaques' test., Tr., p. 84.) Upon condition that Jaques, the person who filed the affidavit upon which this suit was brought, "should withdraw the complaint," he was given permission to turn thirty-five head of his stock into the inclosure (Tr., p. 85), and Cardwell himself testifies that he "went to Mr. Jaques and told him that if he would withdraw the suit, he could put in thirty-five or forty head of steers, dry stock, for the summer." (Tr., p. 163.)

The question, and indeed the only question, in this case is whether, under the facts and circumstances as herein outlined, the appellant violated the provisions of the Act of Congress of February 25, 1885, entitled "An Act to prevent unlawful occupancy of the public lands." If the record in this case discloses that the appellant committed, or suffered to be committed, any acts denounced by the Act of Congress in question, he was liable to prose-

cution, and the decree entered herein, was properly and legally made and rendered.

Independently of the statute, however, forbidding the erection or maintaining of unlawful inclosures upon the public domain, the action was rightly determined upon the facts of the case at bar. Thus in the case of *United States vs. Brighton Rancho Company*, 26 Fed., 218, Mr. Justice Brewer, then a Circuit Judge, delivering the opinion of the Court, said:

“Generally speaking, any encroachment upon the public domain may be restricted or ended by injunction; and in this case it was not the mere fact that the fence is built upon government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also to separate the enclosed lands from the general body of the public domain. So that we think full and adequate remedy can be obtained only in a Court of Equity, which reaches the individual and compels him to abandon and desist from any encroachment on the public property.”

United States vs. Brighton Rancho Co., 26 Fed.,
on p. 219.

An examination of the Act of Congress of February 25, 1885, entitled “An Act to prevent unlawful occupancy of the public lands,” discloses the fact that there are a

number of things prohibited by the provisions of the statute. The acts proscribed are:

1. The making, erecting or constructing by any person of inclosures of any public lands, to which land included within such inclosure, the person making or constructing the inclosure had no claim or color of title.

2. The asserting, by any person, of a right to the exclusive use and occupancy of any part of the public lands, without claim or color of title.

3. Preventing or obstructing, by any fencing or inclosing, or any other unlawful means, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry.

4. Preventing or obstructing, by any fencing or inclosing, or any other unlawful means, free passage or transit over or through the public lands.

1 Supplement Rev. St., pp. 477-478.

The bill of complaint charges the appellant with the commission of each of the several acts forbidden by the statute. It alleges that the appellant erected and maintains the inclosure surrounding the lands therein described, and that the same are in the possession and the exclusive use and occupancy of the appellant. (Tr., p. 2.) That he is occupying said lands and asserting exclusive

right and control thereof, disallowing all other persons and all other stock, except his own, or by his permission to come upon or over said lands. (Tr., p. 3.) That by fencing and inclosing, and by other unlawful means, the appellant did prevent and obstruct all persons from entering upon said lands, and prevented and obstructed free passage and transit over and through said lands by means of fences and other unlawful means. (Tr., p. 4.)

We submit, that each of these averments of the bill of complaint is fully established by the proof in the case. It is conceded by the appellant that the fence on three sides of the inclosure and a portion of the fence on the fourth side, aggregating a total length of seventeen miles of fencing, was erected and constructed by him.

Transcript, pp. 154-156.

And Nelson testifies that the appellant's foreman, Bland, also assisted in the building of the fence on the north side of the enclosure.

Transcript, p. 62.

At the time the appellant, Cardwell, built this fence, a fence extended from the northeast corner of section 6, Township 1 south, Range 21, east, to the northwest corner of section 1, Township 1 south, Range 20, east, and thence ran in a northwesterly direction.

Transcript, p. 149.

And, in the language of the witness Jaques, "when Cardwell hitched onto those fences" he "inclosed the whole business."

Transcript, p. 89.

The appellant, to be sure, asserts that since he built the fences in question, four miles of the seventeen miles of fence constructed by him were turned over to Thomas, Witt and Rosean, but, strange to say, not one of them was called to corroborate the appellant's disclaimer or vouch for the truth of his testimony. But the inclosure itself was looked after and taken care of by Bland, the appellant's foreman. In fact, the whole of Bland's duties as foreman consisted of the care of this inclosure. (Tr., pp. 111-112.) His orders were to turn out all stock and cattle which did not belong to the appellant, and these orders, given by Cardwell himself, were carried out to the letter.

Transcript, pp. 128, 129, 133, 134, 161.

But, says counsel, while "the decree finds that the fence is maintained and controlled upon the land, the evidence fails to show that appellant has any fence on any part of the land described in the bill of complaint." In this the counsel is clearly mistaken. The testimony of appellant's own witness, his foreman, Bland, shows that on three sections only is the fence located upon the appellant's lands, to-wit: Sections 33, 21 and 9, the bal-

ance of the fence being on the section lines, and therefore necessarily upon a portion of the lands described in the bill of complaint.

Transcript, pp. 126-127.

Be that as it may, however, it is utterly immaterial whether the fence is upon the appellant's land or upon the public lands of the United States. The statute declares " 'that all inclosures of public lands' shall be unlawful, without reference to whether the fence constituting the inclosure shall be on public or private land."

U. S. vs. Camfield et al., 59 Fed., 561.

Affirmed in:

Camfield et al. vs. U. S., 66 Fed., 101.

And in:

Camfield et al. vs. U. S., 167 U. S., 518.

That the inclosures in question in this case were unlawful within the purview of the Act of Congress is self-evident. The inclosure was in charge and under the control of appellant Cardwell. The making, erecting, constructing and maintaining of this inclosure was a violation of the Act referred to, and, as expressly provided by section 4 of the Act, all persons violating any provisions of said Act, "whether as owners, part owners, or agents, or who shall aid or assist in any violation" thereof, are equally amenable to the law and subject to the penalty therein prescribed.

See Sections 2 and 4, Act February 25, 1885, Supplement Rev. St., p. 478.

We submit, therefore, that the case was properly and rightly determined, that no error was committed, and that the judgment and decree of the trial court should be affirmed.

Respectfully submitted,

CARL RASCH,

United States Attorney.



Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book, or full compensation is made therefor to the satisfaction of the Trustees.

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